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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 501

HOSKINS COAL AND DOCK CORPORATION,
Petitioner,

vs.

TRUAX TRAER COAL COMPANY AND UNITED ELECTRIC COAL COMPANIES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI.

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vs.

TRUAX TRAER COAL COMPANY AND UNITED ELECTRIC COAL COMPANIES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Hoskins Coal and Dock Corporation, plaintiff below, prays that a writ of certiorari be issued to review the decision of the Court of Appeals for the Seventh Circuit affirming a judgment of the District Court dismissing the complaint.

OPINION BELOW.

The opinion in the Court of Appeals is, as yet, unreported.

JURISDICTION.

The jurisdiction of this Court is invoked under U. S. C., Title 28, Sec. 1254, par. (1) (62 Stat. 928).

The decision to be reviewed was rendered by the Court of Appeals for the Seventh Circuit on October 17, 1951. (R. 31.)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner brought this action pursuant to Sec. 4 of the Clayton Act (U. S. C. Title 15, Sec. 15) to recover treble damages for a violation of Secs. 1 and 2 of the Sherman Antitrust Act (U. S. C. Title 15, Secs. 1 and 2.)

Defendants below filed motions to dismiss the complaint on the ground, among others,[1] that the cause of action asserted had arisen in Illinois more than two years prior to the commencement of the action and was barred by the Illinois two-year statute of limitations covering suits for a "statutory penalty". (Ill. Rev. Stat. 1947, Chap. 83, Sec. 15.) (R. 16-21.) The District Court sustained the motions on the grounds therein stated and dismissed the complaint. (R. 21.)

The Court below affirmed on the sole ground that the

1. Other grounds alleged were: (a) The complaint charged only a private wrong and failed to disclose the restriction of any public right; (b) Interstate commerce was not involved; (c) The complaint failed to disclose any proximate connection between the injury to plaintiff's business and a violation of the law by defendants; (d) *Res adjudicata.* (R. 16-21.)

suit was not begun within two years after the cause of action accrued and was therefore barred. It did not consider the other grounds urged in support of the motions to dismiss. (R. 33.)

In its decision the Court below, in conformity with the ruling in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 397, held that the controlling statute of limitations was that of the State of Illinois. It thereupon applied the two-year Illinois limitation statute governing suits for a "statutory penalty" on the ground that the object of Sec. 4 of the Clayton Act was to inflict a punishment on the party violating the Antitrust laws and was, therefore, penal in character. The Court below rejected petitioner's contention that these actions were covered by the Illinois five-year statute of limitations barring "civil actions not otherwise provided for", which governs suits for statutory remedies. (Ill. Rev. Stat. 1947, Chap. 83, Sec. 16.)

In reaching this conclusion the Court below relied on both federal and state cases which it erroneously deemed to be in point and controlling. (R. 31-33.)

The federal decisions relied upon by the Court below loosely used the term "penalties" as descriptive of treble damages under the antitrust laws. In none of these cases, was it held that an action for treble damages was to be considered penal for the purpose of applying a state statute of limitations. In relying on these federal decisions the Court below ignored the holding of this Court in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 397, decisions of Courts of Appeals for the 2nd, 5th, 9th and 10th circuits, and its own previous decisions which hold that actions for treble damages under the antitrust laws are remedial and compensatory and not penal in character.

The Court below also reached its conclusion that the action was one for a penalty by analogizing a treble damage action under Sec. 4 of the Clayton Act to an action under an Illinois statute which granted a recovery of treble damages against railroads making extortionate overcharges. This Illinois statute was held to be penal in *Chicago, Burlington & Quincy R. Co.* v. *Jones,* 149 Ill. 361, 375, 397. The Court below held that it was bound to follow this Illinois decision under the holdings of this Court in *Dibble* v. *Bellingham Bay Land Co.,* 163 U. S. 63, *Bauserman* v. *Blunt,* 147 U. S. 647, and *Pufahl* v. *Estate of Parks,* 299 U. S. 217.

These decisions, however, hold only that a federal court will look to state court decisions to determine the meaning and application of state limitation statutes in diversity cases and in cases involving substantive rights arising under state law. Here, in determining which state limitations provision was applicable the Court below had first to determine the nature of the right granted by Sec. 4 of the Clayton Act. Since this is a federally created right, a federal question is presented which should have been decided by reference to federal and not state law.

In determining the nature of this federally granted right by reliance on state decisions, the Court below is in direct conflict with this Court and Courts of Appeals for the 4th and 9th Circuits.

QUESTIONS PRESENTED.

1. Are not actions under Sec. 4 of the Clayton Act remedial and compensatory, and not penal in nature, so as to make it improper to apply to them a state statute of limitations barring suits for a statutory penalty?

2. Where the determination as to which of several provisions of a state statute of limitations applies to a federally created action depends upon the nature of the action asserted, is it not improper to determine the nature of the federally created action by state and not federal law?

STATUTES INVOLVED.

U. S. C., Title 15, Sec. 15.

Illinois Rev. Stat. 1947, Chap. 83, Secs. 15-16.

REASONS FOR GRANTING THE PETITION.

1. In holding an Illinois two-year Statute of Limitations barring suits for a statutory penalty applicable to treble damage actions under Sec. 4 of the Clayton Act on the ground that such actions under federal decisions are penal in nature, the Court below is in direct conflict with this Court and with the Courts of Appeals for the 2nd, 5th, 9th and 10th Circuits.

The Court below held that an Illinois two-year statute of limitations covering suits for statutory penalties (Illinois Rev. Stat. Chap. 83, Sec. 15) was applicable to actions under Sec. 4 of the Clayton Act on the ground that such actions are penal in nature. (R. 33.) In so holding, the Court below is in conflict with the decision of this Court in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 397. In that case, this Court affirmed a decision of the Circuit Court of Appeals for the Sixth Circuit in *City of Atlanta* v. *Chattanooga Foundry & Pipe Works*, 127 F. 23, 28, 29, holding that treble damage actions under the Antitrust Laws are for the enforcement of a civil remedy given by statute for a private injury and are compensatory in purpose and effect, although recovery is permitted in excess of actual damages.[1]

This Court, therefore, decided that such actions did not fall within the provisions of a federal five-year statute of limitations barring suits "for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States." (Rev. Stat. § 1047, U. S. Comp. Stat. 1901,

1. For a full discussion as to why such actions are compensatory, see the opinion of the U. S. District Court in *City of Atlanta* v. *Chattanooga Foundry & Pipe Works*, 101 F. 900, which was adopted by the Circuit Court of Appeals, 127 F. 23, 29.

p. 727; as now amended U. S. C. Title 28, Sec. 2462.) Since there was no other applicable federal statute of limitations, this Court concluded that the local Tennessee statute of limitations governed under the doctrine of *Campbell* v. *Haverhill,* 155 U. S. 610. However, this Court determined that it would not apply that provision of the Tennessee statute of limitations governing "statute penalties" because of its adherence to the construction of an action for treble damages under the Antitrust Laws which it had already adopted in determining that the Federal statute of limitations was not applicable, namely: that the action was not for a penalty.

This Court, by its affirmance of the decision of the Circuit Court of Appeals, sustained the reasoning of that Court that in no event could the Tennessee limitation statute governing suits for "statute penalties" be applicable; since if the action was one for a penalty, the federal limitation statute would govern and there would therefore be no necessity to look to the state law. *City of Atlanta* v. *Chattanooga Foundry & Pipe Works,* 127 F. 23, 28.

The Court below has completely ignored the rationale of the Chattanooga case that the only reason a state statute of limitations is applicable in the first place is because treble damage actions under the Antitrust Laws are not penal, but compensatory and remedial.

The Court below attempted to justify its holding by citing federal cases which allude to recoveries under Sec. 4 of the Clayton Act as "penalties." (R. 33.) In those cases the term "penalties" was loosely used and in none of them was that characterization required to reach the decision in the case. The reliance of the Court below on the loose language of those cases is startling in view of the contrary decisions of the Courts of Appeals for the 2nd, 5th, 9th and 10th Circuits, as well as its own decisions,

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directly holding that such actions are remedial and compensatory. None of these latter decisions are even referred to by the Court below although they are in conflict with its decision here.

Thus in *Hicks* v. *Bekins Moving & Storage Co.* (CA—9), 87 F. 2d 583, 585; *United Copper Securities Co.* v. *Amalgamated Copper Co.* (CA—2), 232 F. 574, 577; *Sullivan* v. *Associated Billposters & Distributors* (CA—2), 6 F. 2d 1000, 1009; and *Fazakerly* v. *E. Kahn's Sons Co.* (CA—5), 75 F. 2d 110, 114, it has been held that such an action was not penal and therefore either survived the death of one of the parties or could be revived. In *Burnham Chemical Co.* v. *Borax Consolidated, Limited* (CA—9), 170 F. 2d 569, 571, 575, 578, and *Oklahoma* v. *American Book Co.* (CA—10), 144 F. 2d 585, 587, the Courts refused to apply to these actions state limitations statutes of California and Oklahoma, respectively, governing statutory penalties. In *Baush Machine Tool Co.* v. *Aluminum Co. of America* (CA—2), 63 F. 2d 778, 780, a bill of discovery in aid of a suit under Sec. 4 of the Clayton Act was held to be properly granted since such an action was not for the enforcement of a penalty.[1]

The Court below is also in conflict with its own decisions in *Roseland* v. *Pfister Mfg. Co.* (CA—7), 125 F. 2d 417, 419, and *Activated Sludge, Inc.* v. *Sanitary District of Chicago* (CA—7), 157 F. 2d 517, adopting the opinion of the District Court in the same cause, 64 F. Supp. 25, 35, that actions under Section 4 of the Clayton Act are remedial

1. District Courts of the United States have consistently adhered to the decision in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390 that actions under Sec. 4 of the Clayton Act are remedial and not penal. See *Christensen* v. *Paramount Pictures, Inc.*, (C. D. Utah), 95 F. Supp. 446, 450; *United West Coast Theatres Corp.* v. *South Side Theatres Co.* (S. D. Cal.), 86 F. Supp. 109, 110; *Winkler-Koch Engineering Co.* v. *Universal Oil Products Co.* (S. D. N. Y.), 100 F. Supp. 15, 28, 29; *Momand* v. *Universal Film Exchanges, Inc.* (Mass.), 43 F. Supp. 996, 1008.

and not penal. The judge delivering the opinion of the Court below in the case at bar did not refer to these two decisions, which is curious since he wrote both of them.

The conflict between the Court below and this Court as well as with so many Courts of Appeals for other Circuits is a matter of great public importance which this Court should correct in its desire to achieve a uniform application of the Antitrust Laws.

2. In characterizing an action under Sec. 4 of the Clayton Act as penal in nature because of the multiple damage feature of the recovery permitted, the Court below is in conflict with decisions of this Court and Courts of Appeals for the 2nd, 3rd and 9th Circuits.

In addition to the conflicts above set out, the decision below also conflicts with the holdings of this Court in *Brady* v. *Daly,* 175 U. S. 148, 154-157, construing actions under the Copyright Act, and *Overnight Motor Transportation Co., Inc.* v. *Missel,* 316 U. S. 572, 583, construing actions under the Wages & Hours Act, that enlargement of damages under those acts, respectively, did not convert the actions into prosecutions for a penalty. The principle of *Brady* v. *Daly,* 175 U. S. 148, 154-157, has been applied to actions under Section 4 of the Clayton Act. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U. S. 390, 397; *Baush Machine Tool Co.* v. *Aluminum Co. of America* (CA—2), 63 F. 2d 778, 780.

Further the decision below also conflicts with two 9th Circuit decisions, *Culver* v. *Bell & Loffland* (CA—9), 146 F. 2d 29, 31, and *Kessler* v. *Fleming* (CA—9), 163 F. 2d 464, 468, and a decision of the 3rd Circuit, *Fields* v. *Washington* (CA—3), 173 F. 2d 701, 703. These cases hold that actions for double damages under the Wage & Hours Act and for treble damages under the Emergency Price Control Act and the Housing & Land Act are compensatory and not penal.

3. In determining the nature of the action based upon Sec. 4 of the Clayton Act by resort to state rather than federal decision the Court below is in direct conflict with this Court and the Courts of Appeals for the 4th and 9th Circuits.

This Court has held that the nature of a right created by federal statute is a federal question which is determined by federal and not state law. *Prudence Realization Corp.* v. *Geist,* 316 U. S. 89, 95; *Dietrick* v. *Greaney,* 309 U. S. 190, 200, 201; see concurring opinion of Mr. Justice Jackson in *D'Oench, Duhme & Co., Inc.* v. *Federal Deposit Insurance Corp.,* 315 U. S. 447, 471.

The Courts of Appeals for the 4th and 9th Circuits, in applying local statutes of limitation, have followed this rule in construing the nature of the rights granted by Sec. 4 of the Clayton Act, *Barnes Coal Corp.* v. *Retail Coal Merchants Ass'n* (CA—4), 128 F. 2d 645, 648-650; *Glenn Coal Co.* v. *Dickinson Fuel Co.* (CA—4), 72 F. 2d 885, 890, and also in construing the nature of the rights granted by the Wages & Hours Act, *Culver* v. *Bell & Loffland* (CA—9), 146 F. 2d 29, 31.

The Court below in here applying the Illinois statute of limitations was first required to ascertain the character of petitioner's action. This follows from the terms of that statute, which makes its applicability dependent upon the nature of the cause of action asserted. Since petitioner's action was brought under Sec. 4 of the Clayton Act the determination of its nature was a federal question, and in the light of the decisions of this Court and of the Courts of Appeals for the 4th and 9th circuits, this determination should have been made by recourse to federal decisions. The Court below, however, disregarded this familiar principle of law which would have required it under the federal decisions hereinbefore discussed,

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pp. 6 to 8, to conclude that such actions are compensatory and remedial and not penal and therefore not within the Illinois limitation statute covering suits for statutory penalty.

Instead, the Court below chose to rely upon Illinois decisions holding that when the object of a statute is to inflict punishment upon a party violating it the statute is penal in character, even though a remedy is afforded to those having an interest in its observance. (R. 33.)

The Court below seized upon one of these Illinois decisions, *Chicago, Burlington & Quincy R. Co.* v. *Jones,* 149 Ill. 361, 375, 397, as providing an analogy between an action under Sec. 4 of the Clayton Act and an action under an Illinois statute granting treble damages against railroads making extortionate overcharges. This Illinois statute was there held to be penal. The Court below therefore concluded that actions under Sec. 4 of the Clayton Act were penal and hence within the two-year Illinois Statute of Limitations covering "statutory penalties."

The reliance of the Court below upon these Illinois decisions was founded upon its understanding based on *Dibble* v. *Bellingham Bay Land Co.,* 163 U. S. 63; *Bauserman* v. *Blunt,* 147 U. S. 647, and *Pufahl* v. *Estate of Parks,* 299 U. S. 217, that in determining which of the several provisions of the Illinois limitations statute controls, it was bound by interpretations of that statute by the Illinois courts. (R. 31, 32.) But, in relying on those cases to justify the use of Illinois decisions to interpret the nature of rights arising under a federal statute, the Court below misapplied the holding of those cases.

The *Dibble* and *Bauserman* cases stand for the proposition that a federal court will apply the same limitation to an action based upon a state substantive right that the state courts would apply to that action. In both of those cases

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it was not necessary, as here, to determine the nature of the cause of action relied upon, and even if it had been necessary it would have been quite proper to do so under state decisions since in each of these cases a state created right was relied upon.

The *Pufahl* case held only that a local statute of limitations was applicable to an action brought in a state court to enforce a claim in probate arising under the National Banking Act. It is quite pertinent to note that in that case the nature of the federally created right was first determined under federal law before the local statute was applied.

In none of these cases was the nature of a federally created right ascertained by state decisions nor was it necessary for the Court to make a choice of one of several provisions of a state statute of limitations, and hence they are not in point.

Moreover, the *Dibble, Bauserman* and *Pufahl* cases would here only authorize the use of Illinois decisions which interpret the Illinois limitations statute. The Court below, however, went far beyond such permissible limits and relied on Illinois decisions which construed the nature of state statutes granting substantive rights of action. It thus construed the nature of a federally created right by reference to state court decisions, which, as above pointed out, brings the Court below in conflict with this Court and the Courts of Appeals for the 4th and 9th Circuits. Further, even under Illinois law, the Court below is in plain error in characterizing actions under Sec. 4 of the Clayton Act as penal by analogy to Illinois cases, for it is the law in Illinois that its State Courts will interpret federal statutes according to federal decisions, even when the rule of the state on a similar matter is to the contrary. *Rothschild & Co.* v. *Steger Piano Co.*, 256 Ill. 196, 205, 206.

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In addition, the Court below is again in conflict with itself. In *Moore* v. *Backus* (CA—7), 78 F. 2d 571, 575, the Court held that the "character of the legal action" under Section 4 of the Clayton Act "is to be determined by the federal court," as the Antitrust Laws are general in nature and "successful enforcement would seem to require a uniform interpretation."

We agree with the Court of Appeals for the Seventh Circuit that the need for uniformity in the interpretation of the Antitrust laws requires that their character be determined by federal courts. This Court should grant certiorari to resolve the conflict created by the decision of the Court below in order that uniformity may be established.

4. The decision of the Court below is of wide public importance, since, if permitted to stand, it will affect not less than 23 private antitrust cases now pending in the United States District Court for the Northern District of Illinois. In addition, it has impact on cases pending in other Districts. It will also discourage the bringing of future suits, thus jeopardizing the effectiveness of ancillary enforcement of the antitrust laws by means of private actions.

There are at present at least 23 private antitrust suits pending in the United States District Court for the Northern District of Illinois. These suits were filed when it appeared that this Court had taken the view that the Illinois five-year statute of limitations applied to actions under Sec. 4 of the Clayton Act. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251.[1]

1. Although the applicable statute of limitations was not an issue in that case, nevertheless the plaintiff was permitted to recover for damages during the period of five years immediately preceding the filing of the complaint. (See *Bigelow* v. *RKO Radio Pictures, Inc.* (CA—7) 150 F. (2d) 877, 879.)

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The effect of the decision below either reduces the period for which damages in those cases are recoverable, or outlaws them completely.

In addition, the decision below will have impact in those District Courts of the United States located in states having local statutes of limitation of shorter duration governing statutory penalties than their statutes covering remedial and compensatory actions. For example, this decision, if followed in other circuits, will greatly affect private antitrust suits brought in New York, Ohio, California, Florida, Iowa, Indiana, Wisconsin, Tennessee and Delaware.[2]

The effect of the decision below is thus national in scope affecting cases in which millions of dollars in damages have been suffered by plaintiffs at the hands of monopolists and restrainers of trade.

Further, as a result of the decision below substantially

2. *California:* One year upon a statute for a penalty or forfeiture; three years upon a liability created by statute, other than penalty or forfeiture. Deering, Civil Procedure and Probate Codes of California (1949) Secs. 340, 338. *Delaware:* One year on a civil action for a forfeiture upon a penal statute; three years for other actions based on a statute. Revised Code of Delaware (1935), Ch. 146, Par. 5136, Sec. 13, Par. 5129, Sec. 6. *Florida:* Two years upon a statute for a penalty; three years upon a liability created by statute, other than a penalty. Fla. Stats. Ann. § 95.11 (5), (6). *Indiana:* Two years for actions upon a penalty given by statute; fifteen years upon actions not otherwise provided for. Burns—Ind. Stat. Ann. (1946), Secs. 2-602, 2-603. *Iowa:* Two years for a statutory penalty; five years for actions not otherwise provided for. Iowa Code Ann. (1950), Sec. 614.1 (3) and (5). *New York:* Three years for an action upon a statute for a penalty; six years upon a liability created by statute, except a penalty. Civil Practice Act (New York), Art. 2, Pars. 49 (3), 48 (2). *Wisconsin:* Two years upon a statute penalty; six years upon an action for injury to property. Wisc. Stats. (1949) Secs. 330.21 (1), 330.19 (5). *Ohio:* One year upon a statute for a penalty; six years if not a penalty. Page's Ohio Gen. Code Ann., Secs. 11225, 11222. *Tennessee:* One year on statutory penalties; ten years on actions not otherwise provided for. Williams Tenn. Code Ann. (1934), Secs. 8595, 8601.

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lessening the time within which damages may be recovered, prospective plaintiffs will be discouraged from bringing their suits. The limited amount of damages recoverable will not in many instances justify undertaking the risks attendant upon the expenditure of large amounts necessary to bring treble damage actions to trial.

Private actions under Sec. 4 of the Clayton Act aid in the enforcement of the Antitrust Laws and such enforcement is in the public interest. *Bruce's Juices, Inc.* v. *American Can,* 330 U. S. 743, 752; *Maltz* v. *Sax* (CA—7), 134 F. (2d) 2, 4; *Quemos Theatre Co., Inc.* v. *Warner Bros.* (N. J.), 35 F. Supp. 949, 950. Where, as here, such ancillary enforcement is severely curtailed, the public interest demands the exercise by this Court of its supervisory powers.

Conclusion.

The decision of the Court of Appeals for the Seventh Circuit that the determination of the character of the action under Sec. 4 of the Clayton Act, is not a federal question, but must be determined according to state decisions, strikes at the very foundation of the method of interpreting federal statutes. Such decision is in plain conflict with decisions of this Court and Courts of Appeals of other circuits which hold that the interpretation of a federal statute is a federal question and must be determined according to federal decisions. In the vital interest of securing uniform interpretation of federal statutes such conflict should be resolved by this Court.

Further, the decision of the Court below that actions under Sec. 4 of the Clayton Act are penal and not remedial in character, even according to federal decisions, is directly contrary to decisions of this Court and of numerous other Federal courts of review. A corollary to this proposition is that in Illinois, and in many other states, a much

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shorter statute of limitations will govern such actions than if they are held to be remedial in character. This decision thus affects not only the case at bar, but 23 other private antitrust cases now pending in the District Court for the Northern District of Illinois, and numerous cases pending in other districts. The decision also discourages future private antitrust suits.

The conflict of the decision below with the decisions of this Court and other Courts of Appeal, its direct effect on pending cases of numerous other litigants, its deterrent effect on ancillary enforcement of the Antitrust Laws through private suits, the paramount public interest in preserving the vitality of the Antitrust laws, all combine to urge this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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Respondents.

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 501

HOSKINS COAL AND DOCK CORPORATION,
Petitioner,

vs.

TRUAX TRAER COAL COMPANY AND UNITED ELECTRIC COAL COMPANIES,
Respondents.

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This action is the second suit between the same parties, dealing with the same subject matter and presenting the same claim for damages. The first action was tried before a jury and, at the close of petitioner's case, was dismissed on each defendant's motion for a directed verdict. Petitioner took no appeal therefrom. Approximately four years after commencing the first action and 60 days before its trial, petitioner filed the present action.

OPINION BELOW.

The opinion of the Court of Appeals (R. 31-33) is reported in 191 F. 2d 912.

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JURISDICTION.

The judgment of the Court of Appeals was entered on October 17, 1951. (R. 34.) Petitioner filed its petition for writ of certiorari on December 28, 1951, invoking jurisdiction of this Court under 28 U. S. C., § 1254(1).

STATEMENT.

The petition for certiorari fails to state the facts upon which the District Court dismissed this action on the ground, among others, of *res judicata*.

The 1945 Action.*

On August 29, 1945 petitioner filed its 1945 action against these two respondents in the United States District Court for the Northern District of Illinois. (R. 42.) The complaint alleged that respondents had entered into a common law conspiracy, the object of which was to injure petitioner's business in Chicago in retailing Illinois No. 5 seam coal. The conspiracy was effectuated, according to the complaint, by the purchase by each respondent of a mine from which petitioner had theretofore bought coal, and by the refusal of each respondent thereafter to sell petitioner coal produced at the mines. The complaint sought single damages of $500,000. (R. 60-65.)

Trial of the 1945 action began before a jury on September 23, 1949, after the use of pretrial discovery and the denial of respondents' motions for summary judgment. (R. 42.) The evidence disclosed that many mines located in Fulton County, Illinois, produced No. 5 seam coal. For

* To distinguish this earlier action from the present case, thus to avoid confusion between the two lawsuits in the same court each with the same plaintiff and the same defendants, the earlier action will hereinafter be referred to as the "1945 action."

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several years Truax had owned and operated one, and United two, of these many mines.* These three mines were located so close to the Illinois River as to permit a profitable utilization of barge shipment of such coal as distinguished from more costly rail shipment. Two other Fulton County mines, Little Sister and, subsequently, Rushville, were also so favorably located. (R. 43-45.)

In 1938 petitioner began purchasing coal from the Little Sister mine, barging it to Chicago for sale at a laid down cost of 50 to 65 cents per ton under the same coal shipped by rail. In 1944 the owner of Little Sister died and the mine was sold, the buyer making Truax his sales agent. (R. 44.) There was no evidence that United had any knowledge of the offering of Little Sister for sale, or of the sale itself, or of the agency arrangement with Truax.

After the sale of Little Sister, petitioner began to buy coal from the Rushville mine. Due to serious illness the owner of that mine decided to sell it, and both petitioner and United negotiated for it, United buying the mine in 1945. United did not know that petitioner had been buying Rushville coal or had made a bid for the mine. (R. 45-46.) There was no evidence that Truax had any knowledge that petitioner was buying Rushville coal, or that the Rushville mine was being offered for sale, or that United had bought the mine.

The war period of 1943 to 1945 was a period in which any producer or coal merchant could sell all of the coal he could produce or buy. (R. 48.) Truax refused to sell petitioner coal after it became sales agent for Little Sister because it had an inadequate supply of coal to meet its own requirements. (R. 45.) Some evidence indicated that Truax's refusal was also based on the reputation of plain-

* For brevity, respondent, Truax Traer Coal Company, will be referred to as "Truax" and respondent, The United Electric Coal Companies, as "United."

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tiff as a "price cutter." (R. 47.) In 1942 United had refused petitioner's request to sell coal to one of petitioner's customers because United had no coal for sale at the time. (R. 47.) In 1945 United refused to sell petitioner Rushville coal but in 1946 sold some coal to petitioner on the basis of "cash in advance", because upon checking references, United found producers were protecting their sales to petitioner by these terms. (R. 47.) There was no evidence that either respondent knew petitioner had asked the other for coal and had been refused.

Petitioner adduced considerable evidence that he had complained to the Solid Fuels Administration for War concerning Truax's refusal to sell petitioner coal after the sale of the Little Sister mine. (R. 45.) It introduced evidence showing that each respondent belonged to Middle States Fuels, Inc., a producers' association formed under the Bituminous Coal Act, but petitioner was unsuccessful in attempting to show that respondents sought to induce other members of this Association not to sell coal to petitioner. (R. 48-49.) Petitioner, also unsuccessfully, attempted to show that each of the respondents, after the sale of the two mines, sought and secured, as customers, petitioner's former customers. (R. 47-48.) Finally, petitioner sought to prove a wrongful motive on the part of respondents by showing that petitioner was a "price cutter" in the Chicago retail market, and, in this connection, petitioner introduced in evidence the regulations and minimum coal prices established under authority of the Bituminous Coal Act. (R. 48.)

At the close of petitioner's case, which consumed six days, during which eighteen witnesses, including six of respondents' present and former officers and employees, were examined by petitioner, eighteen exhibits introduced by it (R. 42-43), and a record of 710 pages built up (R. 41), respondents each moved for a directed verdict in its favor.

The District Judge granted this motion on the ground, among others, that there "is no evidence that they [the respondents] did it [the acts alleged] in combination or conspiracy * * *." (R. 49.) Petitioner did not appeal from the judgment. (R. 50.)

The Present Action.

During the summer preceding this trial, petitioner filed this present action. (R. 2.) Petitioner's complaint is a repetition of its complaint in the 1945 action (cf. R. 3-15 and R. 60-65), but dressed up with a summarization of the evidence which petitioner had prepared for trial of the 1945 action and with insertion of the phrase "interstate commerce" at various places. Petitioner still complains of its supposed injury of $500,000, although since its present complaint is brought under Section 4 of the Clayton Act,* this ad damnum is trebled to amount to $1,500,000, together with costs of suit and a reasonable attorney's fee. (R. 15.) Respondents promptly moved to dismiss the present action on the grounds that the cause of action arose in the State of Illinois more than two years prior to the commencement of the action,** and that, in any event, the complaint failed to state a claim under Section 4 of the Clayton Act but alleged at the most a private grievance involving intrastate commerce. (R. 16, 17.) Subsequent to the adjudication of the 1945 action, respondents each filed supplemental motions to dismiss the present action

* 38 Stat. 731, 15 U. S. C. § 15.

** This called into play Ill. Rev. Stat., ch. 83, § 15, which provides that "Actions for damages" for personal injuries, among others, "for a statutory penalty * * * shall be commenced within two years next after the cause of action accrued." As the Court of Appeals noted (R. 32), petitioner had insisted that its treble damage action ought to fall within the terms of the Illinois five year statute, Ill. Rev. Stat., ch. 83, § 16, applicable to actions on unwritten contracts "and all other civil actions not otherwise provided for."

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on the grounds of *res judicata* and estoppel. (R. 19, 20.) The District Court, on March 1, 1951, dismissed the present action for the reasons set forth in these motions and supplemental motions. (R. 21.)* The Court of Appeals felt it unnecessary to reach the other aspects of the case, sustaining, as it did, the judgment of the District Court on the sole ground of the Illinois two year statute of limitations. (R. 33.)

In the Court of Appeals both petitioner and respondents argued that the Illinois law of limitations is applicable to actions for treble damages under Section 4 of the Clayton Act. The issue before that court was which of two Illinois provisions applied: the two year, or the five year, provision. The Court of Appeals applied the two year bar in the present action, and affirmed the judgment of the District Court (R. 32-33), since under the decisions of the Supreme Court of Illinois actions for treble damages under rights created by Illinois must be brought within two years next after they accrue.

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* Petitioner, in its appeal to the Court of Appeals in this present action complaining of the District Court's judgment (R. 22), failed to designate the record in the 1945 action which respondents had physically brought into the present action in the District Court. (R. 40.) The respondents therefore brought the 1945 record up to the Court of Appeals (R. 40), pointing out to that court that the parties to the 1945 action and the present were the same in both cases, as were also the business allegedly injured, the charges of conspiracy, the acts of the defendants, and the claim of injury and damages.

The same omission from the record was made in the designation to this Court. (R. 41.) At respondents' suggestion, and with respondents' aid, the record in the 1945 action was boiled down to narrative form and, in such form, stipulated before this Court as fair, true and correct. (R. 41.)

QUESTIONS PRESENTED.

Respondents respectfully suggest that the two questions posed by the petition properly are these:

1. Is it not proper to apply to the present action, which seeks treble damages under Section 4 of the Clayton Act and was brought in a federal District Court in Illinois, the limitation law of the State of Illinois which would apply to such action, if state created?

2. Is it not proper to bar petitioner from re-asserting in the present action the same claim of conspiracy which was decided adversely to petitioner, in the 1945 action, where in both actions the business allegedly injured, the charges of conspiracy, the acts of respondents, and the claim of injury and damages were all the same, and the only difference between the two actions was the theory of recovery?

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ARGUMENT.

I.

THERE IS NO FEDERAL QUESTION OF SUBSTANCE INVOLVED IN THIS ACTION.

A. The Illinois Two Year Statute of Limitations Applies to Actions for Treble Damages.

The Supreme Court of Illinois holds that the Illinois two year statute of limitations applies to treble damage actions and the Illinois five year statute of limitations applies to like actions for single damages. Petitioner does not dispute that if this treble damage action were created by the laws of the State of Illinois it would be barred by the Illinois two year statute.

These principles were squarely established in Illinois as long ago as *Chicago, Burlington & Quincy Railroad Company* v. *Jones,* 149 Ill. 361, 37 N. E. 247 (1894), in which case the Illinois Supreme Court held the Illinois two year statute applicable to an Illinois statutory treble damage claim which was in all substantial respects identical with the language of Section 4 of the Clayton Act.

The *Jones* case involved a claim, under the Illinois railroad anti-discrimination act,* by a shipper of livestock against the carrier to recover for alleged charges in excess of the schedule of reasonable maximum rates established by the Illinois Railroad and Warehouse Commissioners. The shipper, in all counts but one of his complaint, sought in the words of the Illinois statute, to "recover from such railroad corporation, in any form of action, three times the amount of damages [the amount of the overcharge] sus

* Illinois Laws 1873, p. 135, now Ill. Rev. Stat. 1951, ch. 114 §§ 118 to 127.

tained by the party aggrieved, together with costs of suit and a reasonable attorney's fee, to be fixed by the court."* In his last count, the shipper sought, alternatively, to recover single damages for the violation of the railroad's common law liability as a carrier for charging more than reasonable rates.

The Supreme Court of Illinois held, first, that the Illinois two year limitations law—Chapter 83, § 15—was applicable to the shipper's claim for treble damages, and second, that the Illinois five year limitations law—Chapter 83, § 16—was applicable to the shipper's claim for single damages. (149 Ill. 361, 397-399, 37 N. E. 247, 258.) This construction of the Illinois law has never been questioned. It was examined and accepted by the District Judge and by the three judges of the court below, all of whom are constantly required to pass upon Illinois law questions. One of the three judges, the writer of the opinion for the court below, has long been a resident and lawyer of Illinois.** Cf. *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701, 707-708 (1949); *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390, 398 (1906).

The present action was therefore brought in a forum of a state whose two year limitations statute has been constantly construed by its highest court to read as if written thus: "Actions for treble damages * * * shall be commenced within two years next after the cause of action accrued."

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* Ill. Rev. Stat. 1951, ch. 114, § 123.

** Judge Walter C. Lindley was born in Neoga, Illinois, on July 12, 1880, was graduated from the College of Law of the University of Illinois with a bachelor of laws degree in 1904 and a juris doctor degree in 1910, and had practiced in Danville, Illinois, until his appointment as a federal judge in 1922.

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B. The Court Below Correctly Applied the Illinois Two Year Statute to the Present Action.

Under the decisions of this Court the court below properly applied the Illinois laws of limitations to the present action. This Court has specifically held, in a treble damage action brought under the Sherman Act,* that Congress, by its silence in the matter, must be presumed to have intended to make such action dependent upon the local limitation laws of the state of the forum; and that, in such action, the local state law is to be determinative of which of its limitation provisions is applicable. *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390, 397 (1906), citing the Rules of Decision Act, at that time Rev. Stat. § 721.**

As a matter of Congressional command, the court below has also properly applied the Illinois two year statute of limitations. This Court has consistently held, under the Rules of Decision Act,*** that federal courts are constrained to follow and apply state laws in cases where they apply. *Bauserman* v. *Blunt,* 147 U. S. 647, 652 (1893); *Dibble* v. *Bellingham Bay Land Company,* 163 U. S. 63, 73 (1896). Particularly in the instance of statutes of limitations is the Rules of Decision Act to be steadfastly and consistently applied. *Campbell* v. *Haverhill,* 155 U. S. 610,

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* 26 Stat. 210; cf. 15 U. S. C., § 15 and note.

** "Thus we come to the main question of the case, namely, which limitation under the laws of Tennessee is applicable, the matter being left to local law by the silence of the Statutes of the United States. Rev. Stat. § 721; *Campbell* v. *Haverhill,* 155 U. S. 610." 203 U. S. 390, 397.

*** 1 Stat. 92; 28 U. S. C. § 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

614 (1895). And under the Rules of Decision Act, the construction given to the statute of limitations, by the highest court of the state concerned, is regarded as part of the statute, and is as binding upon the courts of the United States as the text. If the highest court of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this Court will follow the latest settled adjudication. *Leffingwell* v. *Warren,* 2 Black 599, 603 (U. S. 1862); *Bauserman* v. *Blunt,* 147 U. S. 647, 654 (1893).

Petitioner, though it agrees with the first principle stated, argues that the second principle applies only to diversity cases and not to actions brought to enforce a federally created right. (Petition, p. 4, 11-12.) This contention is clearly erroneous. The consistent rule of this Court has been that the adherence to state law commanded by the Rules of Decision Act must be followed in federal causes of action—that such are "cases where they [state laws] apply." *Campbell* v. *Haverhill,* 155 U. S. 610 (1895) (Massachusetts statute of limitations applied to patent infringement action); *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390 (1906) (Tennessee limitations statute applied to Sherman Act treble damage action; choice of which state statute left to local law); *Pufahl* v. *Estate of Parks,* 299 U. S. 217 (1936) (Illinois common and statutory limitations law applied to claim of receiver of insolvent national bank); *Rawlings* v. *Ray,* 312 U. S. 96 (1941) (Arkansas statute of limitations applied to action to recover assessment upon shares of insolvent national bank); *Cope* v. *Anderson,* 331 U. S. 461 (1947) (Ohio and Pennsylvania law governs period in which to bring suit on Comptroller's assessment laid on shares of insolvent national bank).

Petitioner's chief argument seems to be that actions under Section 4 of the Clayton Act do not, by trebling the

damages, impose a penalty, and that no state statute of limitations covering, among other matters, actions for damages for statutory penalties, can therefore ever be applied. (Petition, p. 7.) This contention will not stand scrutiny. Petitioner relies for this contention on *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390 (1906). This Court, however, held in that case that the federal statute of limitations, Rev. Stat. § 1047, covered that restricted type of statutory penalty (*i.e.*, statutes penal in the international sense)* which was not imposed by Section 7 of the Sherman Act, and that, under Tennessee law, the "statute penalties" provision of the Tennessee statute was not to be distinguished in its scope from Rev. Stat. § 1047, but was coextensive with it. 203 U. S. 390, 398.** In other words, since the coverage of Rev. Stat. § 1047 was too restricted to be applicable, the state statute of the same limited scope was likewise inapplicable. This Court clearly did not hold in the *Chattanooga* case either (1) that federal courts were to be precluded from applying state penalty limitation laws—which might be broader in their scope than the Tennessee law—or (2) that a treble damage antitrust action does not impose a penalty in any sense of the word, whether private or public. Such an erroneous reading of that case would be at odds with the fact that the Court there felt it necessary to determine the reach of the Tennessee one year statute. 203 U. S. 390, 397 (1906). Mr.

* Reference was made in the *Chattanooga* decision to *Huntington* v. *Attrill*, 146 U. S. 657, 668 (1892), and to *Brady* v. *Daly*, 175 U. S. 148, 155, 156 (1899). See 203 U. S. 390, 397. These page references demonstrate that the Court was distinguishing between private and public wrongs; Rev. Stat. § 1047 was applicable only to the latter.

** It is interesting to observe that the Tennessee Supreme Court has reaffirmed the point that, under Tennessee law, its one year limitations statute is inapplicable to an action which permits the recovery of exemplary damages in excess of actual damages. *Doty* v. *Federal Land Bank of Louisville*, 173 Tenn. 140, 114 S. W. 2d 952 (1938).

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Justice Holmes, who wrote for the Court in the *Chattanooga* case, later wrote for the Court in *Fleitmann* v. *Welsbach Co.*, 240 U. S. 27 (1916) of the Sherman Act "penalty of triple damages."* Other courts have similarly described the treble damage anti-trust action.**

Respondents therefore respectfully suggest that the unaltered course of the decisions of this Court admits of no alternative to the question: That, as long as the State of Illinois bars its treble damage actions by its two year statute of limitations, it was proper for the court below to apply this bar to the present action.

If the court below had not applied the Illinois two year statute as a bar to petitioner's reasserted claim, the court would have discriminated in favor of federal causes of action and thus would have disobeyed the statutory command which our very first Congress has placed upon the federal courts: That equal treatment be accorded to actions involving, as in this present action, the laws of the several states, irrespective that the forum be state or federal.*** As was noted as long ago as *Campbell* v. *Haver-*

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* "* * * we agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law." 240 U. S. 27, 29.

** *Sullivan* v. *Associated Bill Posters and Distributors*, 6 F. 2d 1000, 1012 (2nd Cir. 1925) ("punitive or exemplary damages"); *Decorative Stone Co.* v. *Building Trades Council*, 23 F. 2d 426, 427 (2nd Cir. 1928) ("penal damages"); *H. J. Jaeger Research Laboratories* v. *Radio Corp.*, 90 F. 2d 826, 828 (3rd Cir. 1937) ("statutory trebling penalty"); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, 996 (8th Cir. 1945) ("the multiplication of the damage * * * is in the nature of a penalty").

*** It is interesting to observe that the reason state courts were not given concurrent jurisdiction with the federal courts of treble damage Sherman Act claims was due to the belief on the part of Senator Hoar, at that time managing the bill for the Judiciary Committee, that it would have been unconstitutional to have placed such penal actions within the competence of state courts. In a

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hill, 155 U. S. 610, 616 (1895) (involving an action at law for patent infringement where this Court applied the Massachusetts limitation law applicable to torts):

> "* * * If States cannot discriminate against such plaintiffs, why should Congress by its silence be assumed to have discriminated in their favor? Why, too, should the fact that Congress has created the right, limit the defences to which the defendant would otherwise be entitled? Is it not more reasonable to presume that Congress, in authorizing an action for infringement, intended to subject such action to the general laws of the State applicable to actions of a similar nature? In creating a new right and providing a court for the enforcement of such right, *must we not presume that Congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction?*" (emphasis supplied.)

Petitioner would apparently have it that local state laws of limitation apply to Section 4 Clayton Act actions, that the selection of the pertinent local state provision is controlled by state law, which becomes part of the text of the statute, that Illinois treble damage actions are governed by the Illinois two year limitations law, but that petitioner's case is, or should be, an exception.

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debate which resulted in the elimination of an amendment which would have given state courts such jurisdiction, Senator Hoar said [21 Cong. Rec. 3146-7 (1890)]:

> "This section which is proposed to be amended is a section establishing a penalty, threefold damages. Now, you can not clothe a State court with the authority to enforce a penalty.
>
> * * *
>
> "We might perhaps say that a person who owed to another a sum of money under an obligation solely the creature of a statute of the United States might recover in any State court; and if the obligation were created he could recover it equally, whether we said so or not; but we cannot say that a State court shall be clothed with jurisdiction to enforce a claim for threefold the damages suffered, which is purely penal and punitive."

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Petitioner would also apparently have it that in its case the remedy should not be enforced in the manner common to like actions in Illinois; that, instead, the courts below should have rejected the Illinois two year statute of limitations, which the Illinois Supreme Court has construed as applying to such actions as petitioner's, and should have applied the Illinois five year statute of limitations, which the Illinois Supreme Court has construed as being inapplicable to such actions as petitioner's.

The action of the court below, being in accordance with the statutory command of Congress and in conformity with the consistent teaching of this Court, presents no federal question worthy of review by this Court. In accordance with the general policy of this Court, the decision of the court below on a question of state law should be left undisturbed. *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701, 708 (1949).

II.

THE DECISION OF THE COURT BELOW PRESENTS NO CONFLICT.

The decision of the court below is the only decision of any federal court that decides which Illinois statute of limitations applies to Section 4 Clayton Act actions. Hence, the court below necessarily could not have "rendered a decision in conflict with the decision of another circuit court of appeals on the same matter." (Rule 38 of this Court.) Petitioner's extended argument to the contrary (Petition, p. 6-13), and claim of conflict with other circuits, are therefore without foundation.

A. The Limitations Laws of Illinois Are Indigenous.

The decision of the court below, applying the Illinois two year statute of limitations to the present action, does not

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and can not, in the very nature of the case, present a conflict of decision within the federal judiciary. This is so since the Illinois State Court's construction of its two year limitation law is, of course, indigenous to Illinois and is a matter of no concern to other states, whether with different limitation laws or mayhap, with the same apparent statutory pattern or identical language. *Bauserman* v. *Blunt*, 147 U. S. 647, 657 (1893); *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32, 34 (1924).*

Since the question of the content and reach of the Illinois two year limitations statute is controlled by the law of the State of Illinois, and is not of moment in forums dealing with the laws of other States, there can of course be no conflict with other circuits. As this Court said in *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 206 (1938):

> "* * * As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' No such showing was attempted by the petition."

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* "Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein." 265 U. S. 30, 32.

"* * * But if we assume, for the moment, that the two statutes are alike, nevertheless, our determination must be the same. It was within the competency of the federal court to construe the Indiana statute in one way, and it was equally within the competency of the Nebraska Supreme Court to construe the Nebraska statute in an opposite way; and, since the construction becomes part of the statute and is to be read as though in its text, in the one case as in the other, the result is that they are, in effect, not the same, but different statutes * * *" 265 U. S. 30, 34.

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This intramural effect of the local law of one state only, among the forty eight of our Union, by its very nature is incapable of providing a result in conflict with what other courts, in other forums and with other laws, may decide—unless the initial resort to such local law was erroneous, which, as has been seen, is not the case here.

Further, it is misleading and erroneous in two respects to state that the decision of the court below will have impact in the federal courts located in states having penalty limitations laws shorter than those covering "remedial" actions. (Petition, p. 14.) First, the "impact" of which petitioner writes would stem from the Rules of Decision Act and the decisions of this Court, not of the court below, which but merely followed them. Secondly, the "impact" would not obtain unless and until the scope of the shorter statute is construed by the highest court of the state, as in Illinois, to apply to treble damage actions. This necessary condition precedent is not demonstrated by petitioner.* It is therefore too generous to state, as petitioner does (Petition, p. 14) that the effect of the decision below is "thus national in scope." The controlling effect of the decision will be limited to those cases involving the Illinois law of limitations. No decision could be more local in effect.

B. The Cases Cited by Petitioner Present No Conflict.

Of the many cases cited by petitioner as demonstrating its claim of conflict, only four dealt with the matter of the bar of limitations to treble damage actions either under the

* This condition precedent does not exist in Tennessee, one of the "impact" states specified by petitioner. (Petition, p. 14, fn. 2.) *Doty* v. *Federal Land Bank of Louisville*, 173 Tenn. 140, 114 S. W. 2d 953 (1938). It apparently does not exist in Utah and California, and the statement has been expressed that the condition precedent would probably not exist with reference to statutes comparable to those of Utah and California. *Christensen* v. *Paramount Pictures*, 95 F. Supp. 446, 449-450 (D. Utah, 1951).

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Sherman or Clayton Acts, and not one of these four cases concerned limitations laws at all similar to the pattern of the Illinois provisions.

In *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390 (1906), the Tennessee one year limitation law, barring after such time an action for "statute penalties"—as distinct from the Illinois two year law barring "actions for *damages* [emphasis supplied] * * * for a statutory penalty"—was considered inapplicable, not by virtue of some overriding federal law or policy, but by virtue of the restricted reach of that local Tennessee one year law, as declared by a judge learned in Tennessee law. This position has since been reaffirmed in Tennessee. *Doty* v. *Federal Land Bank of Louisville,* 173 Tenn. 140, 114 S. W. 2d 953 (1938).

With regard to the other three cases, which were decisions in other circuits, *Barnes Coal Corp.* v. *Retail Coal Merchants Ass'n,* 128 F. 2d 645 (4th Cir. 1942), involved the matter of survivability which the Virginia law there concerned had made referable as the criterion of the applicability of its one, or five, year statute; and *Burnham Chemical Co.* v. *Borax Consolidated,* 170 F. 2d 569 (9th Cir. 1948), as well as *State of Oklahoma* v. *American Book Co.,* 144 F. 2d 585 (10th Cir. 1944), dealt, respectively, with California and Oklahoma law, each of which provided that actions upon a statute for a penalty or forfeiture should be brought within one year, actions upon a liability created by statute, other than a penalty or forfeiture, should be brought within three years, and all other actions within four years (five, in the case of Oklahoma). The Illinois law, as heretofore noted, has no provision limiting "an action upon a liability created by statute, other than a penalty or forfeiture"; the Illinois law differentiates only between "actions for damages * * * for a statutory penalty" and "all other civil actions."

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The differences among the statutory patterns of Illinois, California, Oklahoma, Tennessee, and Virginia serve only to heighten the impossibility of conflict among the decisions interpreting these laws, not its presence. Cf. *Bauserman* v. *Blunt,* 147 U. S. 647, 657 (1893); *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 34 (1924).

Nor do petitioner's copious references to other decisions of the several circuits afford any basis for a claim of conflict. They simply do not concern the matter of limitations in Section 4 Clayton Act actions at all.* The cases to which petitioner has pointed do not justify its position.

The prior decisions of the court below, also cited by petitioner as being in conflict with its present decision, were formulated, like the other cases presented by it, under widely divergent circumstances. Thus, in *Roseland* v. *Phister Mfg. Co.,* 125 F. 2d 417 (7th Cir. 1942), the question was whether the complaint stated a claim. *Activated Sludge* v. *Sanitary Dist. of Chicago,* 64 F. Supp. 25 (N. D.

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* In the 2nd Circuit, the question in the three cases cited did not concern the statute of limitations. Rather, they involved *assignment, United Copper Securities Co.* v. *Amalgamated Copper Co.,* 232 Fed. 574 (2nd Cir. 1916); *survivability, Sullivan* v. *Associated Bill Posters & Distributors,* 6 F. 2d 1000 (2nd Cir. 1925); and *discovery, Baush Mach. Tool Co.* v. *Aluminum Co. of America,* 63 F. 2d 778 (2nd Cir. 1933).

In the 3rd Circuit, the question in the case cited neither concerned a Section 4 Clayton Act case or the statute of limitations. Rather, it involved the *jurisdiction* of the federal courts to entertain a rent overcharge dispute under $3,000. *Fields* v. *Washington,* 173 F. 2d 701 (3rd Cir. 1949).

In the 4th Circuit, the question was not reached in *Glenn Coal Co.* v. *Dickinson Fuel Co.,* 72 F. 2d 885 (4th Cir. 1934).

In the 5th Circuit, the question in the case cited did not concern the statute of limitations. Rather, it involved the disposition in *bankruptcy* of an unscheduled non-exempt treble damage cause of action. *Fazakerly* v. *E. Kahn's Sons Co.,* 75 F. 2d 110 (5th Cir. 1935).

In the 9th Circuit, the question in two cases did not concern a Section 4 Clayton Act case. *Culver* v. *Bell & Loffland,* 146 F. 2d 29 (9th Cir. 1944) (*overtime wages*); *Kessler* v. *Fleming,* 163 F. 2d 464 (9th Cir. 1947) (*Emergency Price Control Act*). In a third case, the question was one of *assignability, Hicks* v. *Bekins Moving and Storage Co.,* 87 F. 2d 583 (9th Cir. 1937).

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Ill. 1946), adopted *per curiam* in 157 F. 2d 517 (7th Cir. 1946), involved an action for patent infringement. And in *Moore* v. *Backus,* 78 F. 2d 571 (7th Cir. 1935), the question was one of survivability, which the court below at that time felt compelled to determine, under the now repudiated doctrine of *Swift* v. *Tyson,* 16 Pet. 1 (U. S. 1842), from federal law as a matter of "general jurisprudence."

The decision of the court below thus has presented no conflict with other federal courts. The result of the decision, resting as it does on law indigenous to Illinois, is but a local matter. As has been noted above, its effect is far from "national in scope." Petitioner's complaint (Petition, pp. 13-15) that the decision will somehow curtail pending or future private anti-trust actions both within and without the State of Illinois—an assumption which is by no means true*—is not to be addressed to the opinion of the court below but to the Rules of Decision Act and the decisions of this Court made in accordance with that Congressional enactment.

* First, the necessary predicate of state decisional law must obtain to bring into play the Rules of Decision Act; and, secondly, the liberal jurisdiction and venue provisions of Section 12 of the Clayton Act provide access to different forums to not a few treble damage plaintiffs.

III.

THE JUDGMENT BELOW IS CORRECT ON ADDITIONAL GROUNDS.

Apart from its proper application of the Illinois two year statute of limitations to the present action, the judgment of the court below was further correct on the principle of *res judicata* and on the fact that petitioner's complaint does not state a claim under Section 4 of the Clayton Act, constituting, as it does, a purely private grievance of intrastate concern.

The crucial issue in both the 1945 action and in this present action was the existence or nonexistence of the alleged conspiracy between respondents to buy the two mines and to refuse to sell petitioner coal. That claimed conspiracy was found in the 1945 action, after a full trial, to be nonexistent: "Here we have absolutely no such evidence * * * there is no evidence that they [respondents] did it [the acts alleged] in combination or conspiracy." (R. 49.) In this present action plaintiff seeks another trial of that identical issue but under a different theory. This the principle of *res judicata* forbids. *Sealfon* v. *United States*, 332 U. S. 575 (1948); *Mendez* v. *General Motors Corp.*, 161 F. 2d 695 (7th Cir. 1947); *Straus* v. *American Publishers' Ass'n*, 201 Fed. 306 (2nd Cir. 1912).

CONCLUSION.

The present action involves no conflict within the federal judiciary and does not present any federal question of substance which has not long been settled by this court. Further, the judgment of the court below is correct on additional grounds.

We respectfully submit that the petition for writ of certiorari should be denied.

Dated: February 1, 1952.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 501

HOSKINS COAL AND DOCK CORPORATION,
Petitioner,

vs.

TRUAX TRAER COAL COMPANY AND
UNITED ELECTRIC COAL COMPANIES,
Respondents.

PETITIONER'S REPLY TO JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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PETITIONER'S REPLY TO JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

There are several points raised by respondents which call for brief comment.

I.

The Court Should Limit Certiorari to the Question of the Statute of Limitations.

In Paragraph 2 of their "Questions Presented" (Resp. Bf., p. 7) and in Part III of their Brief (Resp. Bf., p. 21), respondents urge upon this Court the question of whether the present suit is barred by the application of the doctrine of *res judicata*. The judgment of the Court below, however, rests exclusively upon a determination of which of

two sections of the Illinois statutes of limitations applies to actions brought under Section 4 of the Clayton Act. The Court of Appeals expressed no opinion with respect to *res judicata,* and consequently there is no ruling by the Court below on that question which requires review by this Court.

We respectfully suggest, therefore, that this Court limit certiorari to the question of the statute of limitations. In the event that this Court should reverse the Court of Appeals, it could then remand the cause to that Court with directions to rule upon the defense of *res judicata,* which does not involve any question of public interest.

II.

The Petition Raises the Substantial Federal Question of Whether the Nature of a Federally Created Right Is to Be Determined by Federal or State Decisions.

The question which this petition presents is not "indigenous" to cases pending before United States District Courts in Illinois. The petition raises a question which is presented whenever a state statute of limitations is to be applied to an action arising under an act of Congress. This question is whether federal or state decisions control in determining the nature and character of a federally created cause of action for purposes of selecting the properly applicable state statute of limitations. It is petitioner's view that this Court decided that question in *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U. S. 390, but that the Court below declined to follow that decision.

The defendants have attempted to obscure the question presented by distorting the decision in *Chicago, Burlington & Quincy R. R. Co.* v. *Jones,* 149 Ill. 361 and reading that distorted version into the Illinois statute of limitations. The argument of defendants in substance is that the words

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"statutory penalty" in the Illinois two year statute mean "actions for treble damages", and therefore there is no necessity to determine the nature of the federal action presented beyond ascertaining that it is an action for treble damages.

Respondents' argument may be summarized: The Illinois Supreme Court, in the *Jones* case, held penal a treble-damage action brought under an Illinois statute entitled "An Act to Prevent Extortion and Unjust Discrimination in the Rates Charged * * * and to Punish the Same * * *," and applied to it the two-year Illinois statute of limitations governing suits for a "statutory penalty." From this it follows, according to respondents, that the Supreme Court of Illinois applies the Illinois two-year statute to all treble damage actions and the Illinois five-year statute, which governs remedial actions, to all actions for single damages. Therefore, the two-year statute of limitations ought to be read as though it were written "Actions for treble damages * * * shall be commenced within two years next after the cause of action accrued." (Resp. Bf., pp. 8, 9.) Actions under Sec. 4 of the Clayton Act are for treble damages. Hence, say respondents, such actions come within the two-year section of the Illinois limitations act.

This argument is plainly fallacious, for it assumes that the Illinois Supreme Court, in the *Jones* case, determined that the statutory cause of action involved was penal *because of* its treble-damage feature. There is nothing whatsoever in the opinion to support that assumption. In fact, it is evident from a reading of the *Jones* case that both parties conceded that the action was penal. The title of the Illinois Railroad Extortion Act alone seems to justify the view that the cause of action created by the Act was designed to punish rather than to compensate.

Moreover, in arguing at p. 8 of their Joint Brief that the two year statute is applicable to all treble damage ac-

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tions and the five year statute to all like single damage actions, respondents have neglected to apprise the Court that the Illinois courts have applied the two year statute to single damage actions. For example, see *Gridley* v. *Barnes*, 103 Ill. 211 (1882); *Vestal Co.* v. *Robertson*, 277 Ill. 425 (1917); *Kimball* v. *Hurlbut*, 12 Ill. App. 500 (1883); *Junker* v. *Kuhnen*, 18 Ill. App. 478 (1886). It therefore makes no more sense to say that the two year limitations provision governs all treble damage actions because in the *Jones* case the Illinois Supreme Court applied it to a treble damage action than to say that it governs all actions for single damages because the Illinois Courts in the above cases have applied it to such actions.

It is obvious, then, that to warrant the application of the two year limitations statute the action must have an aspect other than that of treble damages. The additional aspect required—and wholly ignored by respondents—is that the liability imposed upon the defendant be penal in nature.

Indeed, the Illinois Courts have never discussed the meaning of the phrase "statutory penalty" in the two year statute of limitations. To contend that they have construed it as though it read "actions for treble damages" is thus wholly without justification. What the Illinois Courts have done is this: They have examined, in each case, the nature of the cause of action; after determining, from a consideration of its purpose and characteristics, that it was penal in nature, they have, as a matter of course and without interpretation or analysis, applied the two year limitations statute.

Thus, far from turning to the two year limitations statute and interpreting the words "statutory penalty" to mean "actions for treble damages," the Illinois Courts, as their first task, have invariably sought to determine whether the nature of the liability was penal. The indispensable first step, therefore, in determining whether

the two year Illinois statute is applicable to actions under Section 4 of the Clayton Act, the step which respondents have attempted to obscure, is to determine whether the treble damage liability imposed by Section 4 is penal. The petition asks this Court to decide whether this determination should be made by reference to federal or state decisions. An opinion by this Court will necessarily clarify the method to be followed in applying state limitations statutes to actions arising under acts of Congress, and will resolve the conflict created by the opinion of the Court below.

III.

The Decision of the Court Below Is in Conflict With Decisions of Other Courts of Appeals Which Determine That a Federal Statute Is to Be Interpreted According to Federal Decisions, and Which Also Determine That Section 4 of the Clayton Act is Remedial in Character.

Respondents' argument (Resp. Bf., p. 15) that the decision of the Court below presents no conflict with decisions of other courts of appeal, since no other court of appeals has decided what Illinois statute of limitations should be applied to an action under Section 4 of the Clayton Act, is wholly specious. Obviously, in the nature of things, no court of appeals other than the Court below would ordinarily have occasion to apply the Illinois statute of limitations to such an action.

The conflict lies in the fact that the Court below, in arriving at its decision, acted upon a basic principle which is completely at variance with the principle adopted by Courts of Appeals of other circuits in like cases.

The decision of the Court below is based upon the proposition that for purposes of applying state statutes of limitations, the character of the action under Section 4 of the

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Clayton Act is to be determined by reference to state, not federal decisions. Other courts of appeals have taken the opposite view. (Petn., p. 10-13.)

An additional important conflict lies in the fact that other courts of appeals have decided that actions under Section 4 of the Clayton Act are remedial in character (Petn., pp. 6-9), whereas the Court below held they are penal even under federal law.

These are fundamental conflicts which this Court ought to resolve. The decision of the Court below does much more than create confusion with respect to the nature and enforcement of treble damage actions under the antitrust laws. If the decision that the nature of Section 4 of the Clayton Act is to be interpreted according to state decisions is allowed to stand, it will be cited as authority that the nature of other federal statutes are to be construed according to the same principle. Diversity from state to state in the interpretation of the nature of federal statutes and the consequent force and effect to be given to Congressional policy is the inevitable consequence of the doctrine adopted by the Court below.

IV.

The Effect of the Decision of the Court Below Is Not Confined to the State of Illinois.

The argument of respondents that the decision of the Court below has no effect outside of Illinois (Resp. Bf., pp. 15-17) is unreal, because it ignores the principles underlying the decision. In addition to determining the character of the action created by Section 4 of the Clayton Act by reference to state decisions, the Court below held that that action was penal under federal authorities as well. If other circuit courts of appeals should come to share this view, even if they do not follow state court

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analogies they may apply the generally shorter state statutes of limitations applicable to actions for penalties. Already, on the basis of the decision below, the defendants, in a long-pending treble damage antitrust case in Indiana, have recently amended their answer to plead the Indiana two-year statute of limitations governing actions upon a penalty.[1] This is clearly the beginning of a wide-spread effort of antitrust defendants to use the opinion of the Court below to have antitrust treble damage actions declared penal. Only correction by this Court of the decision of the Court below can prevent the anomaly of "penal" antitrust cases in some states and "remedial" antitrust cases in others.

Conclusion.

Wherefore, petitioner respectfully submits that the questions involved in this case are of such basic importance that this Court should exercise its supervisory powers and grant certiorari.

Respectfully submitted,

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1. *Three Rivers Glass Co.* v. *Ball Brothers, et al.*, Dist. Ct. for the Southern District of Indiana, Civil Action No. 1523. Indiana has a 2-year period of limitations upon a penalty governed by statute and a 15-year period of limitations upon actions not otherwise provided for. Burns Ind. Stat. Ann. (1946), Secs. 2-602, 2-603.

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MOTION FILED FEB 2 1952

IN THE

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OCTOBER TERM, 1951.

No. 501

HOSKINS COAL AND DOCK CORPORATION,
Petitioner,

VS.

TRUAX TRAER COAL COMPANY and UNITED ELECTRIC COAL COMPANIES,
Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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As Amici Curiae

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LA KEVIEW 5-6581

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kins Coal and Dock Corporation for a Writ of Certiorari in this case. The consent of the attorneys for Petitioner herein to the filing of this brief is annexed hereto. The consent of attorneys for the respondents was requested but was refused. The interest of the movants and their reasons for asking for leave to file a brief as *amici curiae* are set forth below.

(1) Each of the movants are practicing attorneys at law maintaining offices in the places designated below their respective names at the foot of this motion and each of them are attorneys for plaintiffs in one or more suits now pending in various District Courts of the United States seeking recovery of treble damages for violations of the antitrust laws of the United States. Between them, they are currently engaged in the prosecution of more than twenty such suits.

(2) The decision of the United States Court of Appeals for the Seventh Circuit in *Hoskins Coal and Dock Corporation* v. *Truax Traer Coal Company,* reported in 191 Fed. 2d 912 (CA-7) holds that the statute of limitations applicable to a suit under Section 4 of the Clayton Act arising in the State of Illinois is the two year period prescribed by Ill. Rev. Stat. Chap. 83, Sec. 15. This section provides:

> "15. Personal injuries, penalties, etc.] Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction, or for seduction, or for criminal conversation, shall be commenced within two years next after the cause of action accrued."

The Court of Appeals, in order to hold the foregoing provision applicable, determined that an action under Section 4 of the Clayton Act is an action that is essentially penal in nature and character.

(3) If it is proper to apply to an action under Section 4 of the Clayton Act a state statute of limintations governing actions of a penal nature, which in most states is a one or two year period, then the interests of movants and of their respective clients as plaintiffs in antitrust suits, as well as the interests of all persons similarly situated throughout the country, is seriously affected. A number of suits pending in the United States District Court for the Northern District of Illinois are already barred, since the acts complained of occurred more than two years prior to the filing of suit and in the remainder of the suits pending in that court, plaintiffs will now be cofined to recovery of damages sustained in the two year period preceding institution of the action. Comparable curtailment will also take place in every jurisdiction that limits suits for statutory penalties to periods of less than five years.

(4) In several of these pending cases there is a question of whether the action may be assigned or whether it survives the death of the aggreived party. In view of the weight of authority that penal actions may not be assigned and do not survive, if the decision of the Court of Appeals and its rationale are permitted to stand, many such cases will be defeated for lack of proper parties.

(5) Movants urge that the Petition for a Writ of Certiorari sets forth sufficient reasons for the Court to review the decision of the Court of Appeals and to reverse it, but in addition to these reasons, and in amplification of some of them, movants seek leave to file the attached brief which invites the Court's attention to the following points:

A. In the absence of a federal statute of limitations, no statute of limitations may be properly applied to a cause of action created by federal law.

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B. This Court has conclusively determined in a prior case, as disclosed by an examination of that case in the trial court, the Court of Appeals and in this Court, that private actions for damages under the antitrust laws are not penal in nature. This being true, regardless of what kind of unique interpretation a state court may place upon its local limitations provision purporting to cover actions for statutory penalties, such a provision may be applied to a cause of action under the antitrust laws.

C. Several Courts of Appeals and numerous District Courts have reached decisions that are in conflict with the decision of the Court below and which were, until that decision, regarded as establishing the doctrine that actions under the federal antitrust laws are not penal in nature.

D. The public interest in enforcement of the antitrust laws and in uniformity and certainty of their application will be seriously affected if the decision of the Court of Appeals is permitted to stand.

E. This Court should review a procedure whereby a Court of Appeals has made use of the state court decisions in such a way that it has abdicated to a state court its exclusive responsibility to determine the character and nature of a federally created right.

It is respectfully suggested that this Court should exercise its supervisory powers to reverse a decision that is in conflict with a decision of this Court and with decisions of other Courts of Appeals and which cuts into established doctrine that has been everywhere relied upon for many years, particularly where no reasons of public policy justify the decision and where numerous reasons require its reversal.

Wherefore, movants pray for leave to file the annexed brief in support of the Petition of Hoskins Coal and Dock Corporation for a Writ of Certiorari in the above-entitled cause.

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Petitioner hereby consents to the filing of the annexed brief in support of its Petition for a Writ of Certiorari in the above entitled cause.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

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Respondents.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 501

HOSKINS COAL AND DOCK CORPORATION,
Petitioner,

vs.

TRUAX TRAER COAL COMPANY and UNITED ELECTRIC COAL COMPANIES,
Respondents.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Court below is reported in 191 F. 2d 912 (CA-7).

Jurisdiction.

The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254, para. 1, (62 Stat. 928).

STATEMENT OF THE CASE.

A statement of the case is contained at page 2 of the Petition for a Writ of Certiori and in the motion presented herewith. The only question considered herein is the propriety of applying Chapter 83, Section 15 of the Illinois Revised Statutes, limiting to two years the time for commencing an action for a statutory penalty, to an action brought under Section 4 of the Clayton Act (15 U.S.C., Sec. 15) to recover damages for violations of the Sherman Act (15 U.S.C. Sec. 1, *et seq.*).

ARGUMENT.

I.

In The Absence Of A Federal Statute Of Limitations No Statute Of Limitations May Be Properly Applied To A Cause Of Action Created By Federal Law.

Since this Court decided *McCluny* v. *Silliman* in 1830, 3 Pet. (28 U.S.) 269, and *Campbell* v. *Haverhill* in 1895, 155 U.S. 610, the federal courts, without regard to the constantly increasing magnitude of national as compared to state and local public policy, have uniformly held that in the absence of a federal statute of limitations, state statutes of limitations may be applied to federally created causes of action. In 1906, Justice Holmes wrote the opinion of the Court in *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U.S. 390, and followed *Campbell* v. *Haverhill* without comment, in holding that a state statute of limitations was applicable to a private damage action based on violations of the Sherman Act. At none of these early dates could anyone have forecast the fecund growth of federal regulation of trade and commerce which has since been witnessed. It is only in retrospect that it is possible to see the havoc that has been wrought in the domain of private rights under the antitrust laws by the doctrine that state statutes of limitations are applicable to actions created by federal law. See "Treble Damage Time Limitations: Federalism Rampant", 60 Yale L. J. 553 (1951) which reviews the cases and discloses that one unlucky enough to be injured in Louisiana by violations of the antitrust laws must bring his action within one year, while one injured in Georgia has ten years, and that between these extremes state statutes of two, three, four, five and six years have been variously applied.

McCluny v. *Silliman* was an action for damages against the register of the United States land office for having failed to register certain lands as required by federal law. No federal statute of limitations had been supplied. The statute of the state where the action was commenced was applied without further comment on the ground that Section 34 of the Judiciary Act of 1789 (later the Rules of Decision Act) was controlling. Prior to this decision statutes of limitations of the forum had readily been applied in diversity cases. See for example, *Bell* v. *Morrison,* 1 Pet. (26 U.S.) 351. Looking backward, it would seem that this body of precedent coupled with the fact that the federal circuit courts had no original jurisdiction based on questions arising under acts of Congress but were mainly confined to cases founded on diversity of citizenship, disabled the Court from considering the ramifications of limiting the assertion of federally created rights by state law. The *McCluny* case was often followed but it was not until *Campbell* v. *Haverhill* that this Court really foreclosed further analysis of the matter.

Campbell v. *Haverhill* was a patent infringement suit and this Court, finding that no federal statute of limitations had been provided, turned, accordingly, to the Rules of Decision Act, U.S. Rev. Stat., Sec. 721 (Successor to Section 34 of the Judiciary Act of 1789) to hold that the state statute of limitations was applicable. Plaintiff argued at length that the recognition given by Congress in the Rules of Decision Act to the laws of the several states did not make such laws applicable to suits over which the state courts had no jurisdiction, that the states, having no power to create the right or enforce the remedy, had no power to limit such remedy or legislate in any manner affecting

the subject matter. By this date, however, the thinking on the question had long been conditioned to the contrary. Justice Brown simply passed over the analysis by labeling it a distinction and not a difference (p. 615) which, although cryptic, does not seem to provide a satisfying rationale. He concluded (p. 618) that statutes of limitations affect the remedy only and do not impair the right.

It is respectfully submitted that the dichotomy between right and remedy is patently a fiction that has outworn its usefulness, at least, certainly, in connection with a matter that vitally affects the administration of such important federal legislation as the antitrust laws. A right without a remedy is devoid of meaning or content. A right which extends in time for one year is not the same as a right which extends in time for ten years. To say that the remedy does not affect the right would seem to be simply to disregard realities.

Moreover, the scope of both federal legislation and federal jurisdiction has been so enormously widened since this court considered the *McCluny* and *Campbell* cases that the entire matter should be re-examined.

The consequences of these early cases are that private rights under the federal antitrust laws have been distorted into a patchwork of disparate rights, depending upon which state they happen to be asserted in. It is not, however, too late to rectify the harm that has been done. *Amici curiae* respectfully suggest that this Court may take judicial notice that in recent decades it has often revised earlier positions on various questions in conformity with a better perspective produced by later day realities and needs.

II.

The True Meaning Of Chattanooga Foundry And Pipe Works v. City Of Atlanta Is That An Action Under The Federal Antitrust Laws Is Not In The Nature Of An Action To Recover A Penalty.

In its opinion below, the Court of Appeals disposed of *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U.S. 390, by the following language (p. 914):

> "We think plaintiff's reliance upon *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* 203 U.S. 390 is misplaced. The court held that no federal limitation existed; that the applicable statute was that of Tennessee; and, approving Judge Lurton's analysis of the decisions of that state, that the pertinent limitation was 10 years."

What was said about the case in the foregoing quotation is true enough, but it does not tell the whole story. *The point of the entire Chattanooga litigation was that if the character of the action was penal, then the federal statute of limitations applicable to such actions would have been controlling.* The trial court held that the character of the action was not penal and was, therefore, controlled by a particular section of the local statute of limitations rather than the federal statute. The Circuit Court of Appeals agreed that it was not penal and was, therefore, controlled by the local statute of limitations, but disagreed with the trial court as to which section of the local statutes applied. The Supreme Court likewise agreed that it was not penal so the federal statute did not apply, and affirmed the Circuit Court of Appeals' decision as to which section of the local statute applied.

That, in brief, is the story of the *Chattanooga* litigation, but it is so crucial to the determination of this matter and

to the status of federal antitrust suits, that *amici curiae* ask the Court's forbearance while they undertake to recapitulate the story in detail from the trial court through the Supreme Court.

The opinion of the trial court reported at 101 Fed. 900 (E. D. Tenn., S.D., 1900) discloses that defendants raised the defense of the Tennessee statute of limitations, asserting that either Section 4469 or Section 4470 of Shannon's Tennessee Revisal applied—the former section prescribing a one-year limitation to actions for *statute penalties*, injuries to the person and certain other civil wrongs, and the latter prescribing a limitation of three years for injuries to real and personal property. Plaintiff maintained that the federal five year statute of limitations relating to actions for any penalty or forfeiture accruing under the laws of the United States was applicable (U.S. Rev. Stat. Sec. 1047).

The Court pointed out at the outset (p. 902) that if the action were in its nature and substance for a penalty or forfeiture, then the federal statute applied. It analyzed in broad scope and in great detail the nature of actions for penalties (pp. 902-906) and, after noting that the Sherman Act provided for criminal punishment as well as a civil remedy for damages, stated (p. 906):

> "It would be unusual to discover that a statute inflicted punishment for infringement of its provisions by fine and imprisonment, or either, and again in the form of pecuniary penalty for the same act. A sound rule of interpretation would be that when a statute inflicts punishment by way of fine and imprisonment at the suit of the state for a public wrong affecting the whole community, and also confers a remedy on a party for private injuries resulting from breaches of the statute, the latter will not be regarded as a penalty unless the statute so declares."

The Court then concluded (p. 906):

> "These and other characteristic points of difference between penal and remedial actions support the conclusion arrived at that these actions [under Section 7 of the Sherman Act] are remedial and compensatory only."

After having decided in the first place that the suit was not penal in character, the Court did not even consider that Section 4469 of Shannon's Tennessee Revisal, prescribing a one year limitation to suits for statute penalties might be applicable, and went on to determine that Section 4470 prescribing a three year limitation to suits for injuries to personal property was applicable.

It is inescapable that the Court decided that the nature of the suit was not penal. Indeed, it is striking that in 1942 the Court below, in *Roseland* v. *Phister Mfg. Co.*, 125 F. 2d 417, 419 (CA-7), relying on the trial court's opinion in the *Chattanooga* case, decided at that time that a treble damage action under the anti-trust laws is not penal. Moreover, it should be noted that in 1946 the same court, in *Activated Sludge, Inc.* v. *Sanitary District of Chicago*, 157 F. 2d 517 (CA-7) adopting the opinion of the District Court, 64 F. Supp. 25, 36, again said that such an action is not penal in nature.

When the *Chattanooga* case was presented to the Circuit Court of Appeals, 127 Fed. 23 (CA-6) Judge Lurton said at the outset (p. 28):

> "If this is an action to recover a penalty, within the meaning of this statute [Section 1047 U.S. Revised Statutes] The suit was in time. The shorter statute of the state, limiting the time for the commencement of suits for statutory penalties to one year, would have no application to a suit for a penalty under an act of Congress. It is only when there is no federal statute that the limitation prescribed by the law of the State is applicable."

Judge Lurton's reasoning is apparent. In no event could the Tennessee "statute penalties" provision be applicable, because if the character of the action was penal, then the federal five year statute applied, and resort to the state limitations act would be unnecessary. However, if the federal limitations act did not apply, which is what Judge Lurton held, the reason was that a treble damage action under the antitrust laws was not penal in character; accordingly, a state statute governing such actions could likewise have no application.

There is not the slightest question that Judge Lurton held that the suit was not penal. He said (at p. 28):

> "We find ourselves in agreement with the Court below in holding that an action under the seventh section of the Act of July 2, 1890, c. 647, 26 Stat. 210 [U.S. Comp. St. 1901, p. 3202] is not a penal action."

And at p. 29 he explained his reasoning:

> "It is not reasonable to construe the remedy so conferred as a penal action, for that would be to add to the punishment by fine or imposed by the other sections of the act an additional punishment by way of pecuniary penalty. The plain intent is to compensate the person injured. True, the compensation is to be three times the damages sustained. But this enlargement of compensation is not enough to constitute the action a penal action within the meaning of Section 1047, Rev. Stat. [U.S. Comp. St. 1901, p. 72]."

Having decided that the federal statute was not applicable because the suit was not a penal action, Judge Lurton turned to the question of which section of the local statute was applicable. He did not even discuss the meaning of the state provision governing "statute penalties", having already concluded that no such provision could be applicable since if the character of the action was penal, the

federal rather than the state limitations provision would apply. The trial court, he pointed out, had applied section 4470 of Shannon's Tennessee Revisal prescribing a three year limitation to "actions for injuries to personal or real property." He decided, however, that the action was covered by Section 4473 prescribing ten years in "cases not expressly provided for". At p. 31, Judge Lurton said:

> "Actions on statute liabilities, *not being a statute penalty,* and not dependent upon any contract, express or implied, are actions not otherwise expressly provided for by any of the other sections of the chapter upon the limitations of actions other than real." (Italics Supplied)

And, concluding his opinion, he said, at page 32:

> "We are, however, of opinion that this is an action on a statute liability, and that the cause of action does not arise out of any agreement, and that such an action is not barred for ten years."

Accordingly, Judge Lurton reversed because the trial court had held the action was barred in three years under Section 4470.

When the case came on to the Supreme Court (203 U.S. 390), Justice Holmes had before him exactly the same problem as had the two lower courts. He had to decide whether the federal statute of limitations was applicable, and if not, which section of the local statute was. *He determined at the outset that there was no federal statute applicable, and the reason he so determined was that he concluded that the action was not penal in character.*

If there is any doubt about Justice Holmes having decided the question, the doubt is resolved by reference to the two cases he cited in that connection, *Huntington* v. *Attrill,* 146 U. S. 657, and *Brady* v. *Daly,* 175 U. S. 148. These cases are extended discussions of when a suit is not penal in nature, the former under state created law, and

the latter under federally created law. If Justice Holmes was deciding anything other than that the suit was not penal, there was no point in citing these cases.

Furthermore, in passing to a consideration of the Tennessee limitations statute, Justice Holmes refused to apply the Tennessee "statute penalties" provision, although noting that it was somewhat different from the federal provision. The reason he gave for dismissing the Tennessee "statute penalties" provision from consideration was that he had to adhere to the construction of an action for treble damages under the antitrust laws which he had already adopted in deciding that the federal limitations provision was not applicable; namely (it must be taken) that the action was not penal in character. He said (p. 397):

> "As to the article touching actions for statute penalties, notwithstanding some grounds for distinguishing it from Rev. Stat. Sec. 1047, which were pointed out, *so far as this liability under the laws of the United States is concerned we must adhere to the construction of it which we already have adopted.* The chief argument relied upon is that this suit is for injury to personal property, and so within Article 2773." (Italics Supplied.)

Thus, having decided that neither the federal penalty statute (U. S. Rev. Stat. Sec. 1047) nor the local penalty statute (Shannon's, Sec. 4469; Tenn. Laws, Art. 2772) had any application because the action was not penal, Justice Holmes was left with the question of whether the trial judge or Judge Lurton had applied the proper local statute. The trial judge had applied Section 4470 controlling injuries to real or personal property, and Judge Lurton had applied Section 4473 controlling actions not otherwise provided for. Justice Holmes affirmed Judge Lurton's construction of the local law, since, as he pointed out, Judge Lurton had long experience on the Tennessee Supreme Court.

Judge Lurton did not make any analysis of the "statute penalties" provision of the Tennessee statutes (Shannon's, Sec. 4469). He found that unnecessary to do, since he had determined initially that the action was not penal and, therefore, the federal limitations provision did not apply. And, since the action was not penal, the local "statute penalties" provision could in no way be conceivably applicable. The only state statutes which Judge Lurton's opinion purported to construe, were the local ten year and the local three year provisions. In "approving Judge Lurton's analysis of the decisions" of Tennessee (contrary to the opinion of the Court below, p. 914), Justice Holmes could not, therefore, have relied on any analysis by Judge Lurton of the Tennessee "statute penalties" provision, since no such analysis was made. Accordingly, it cannot be inferred that in reaching a decision Justice Holmes merely interpreted the meaning of both the Federal and Tennessee limitations provisions governing penal actions, rather than passing on the underlying question of whether the action was penal in character.

Amici curiae submit that it is inescapable, first, that Justice Holmes determined that the suit was not penal in nature, and, second, that he had to so determine in order to make his decision, for if the suit were penal, then the federal statute would have been applied, and Justice Holmes would never have been called upon to turn to the local law to pass upon which section applied. Moreover, the suit not being penal in character, it was unnecessary to analyze the local "statute penalties" provision, since in no event could that have been applicable.

III.

Following The Chattanooga Case Several Courts Of Appeals And Numerous District Courts Have Reached Decisions That Are In Conflict With The Decision Of The Court Below And Which, Until That Decision, Were Regarded As Establishing The Doctrine That Actions Under The Federal Antitrust Laws Are Not Penal In Nature.

There are two large classes of federal antitrust cases in which the decisions have turned upon the question of whether the action is in the nature of one to recover a penalty. In the one class of cases the answer to the question determines whether the action survives the death of a party and also whether it may be assigned. In the other class of cases, the answer determines whether a statute of limitations relating to actions to recover statutory penalties applies or whether some other statute of limitations applies. In both classes of cases, the federal courts have consistently taken the position that the action is not in the nature of one to recover a penalty. These cases will be considered together as establishing the same proposition; namely, that the character of the action is not penal.

Survivorship Cases.

It has long been well established that actions on penal statutes do not survive. *Schreiber* v. *Sharpless,* 110 U.S. 76, 80. In *Moore* v. *Backus,* 78 F. 2d 571, 575, 576 (CA-7), the Court below held that a treble damage action under the antitrust laws survived the death of the injured party. It reached this result by analyzing applicable federal decisions, but also determined that even on the basis of Illinois law, its decision would have been the same. The thrust of the decision is that the action was not in the nature of one

to recover a penalty or it would not have survived. *Consequently, if the court below is not reversed, the decision will have overruled sub silentio Moore* v. *Backus.*

In *Hicks* v. *Bekins Moving and Storage Co.*, 87 F. 2d 583, 585 (CA-9), which was an action for treble damages arising under the federal antitrust laws, the Court, relying on *Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* determined that such an action was not one for a penalty, and, therefore, survived the death of the injured party and was assignable. The decision is in accord with *Moore* v. *Backus* and with *United Copper Securities Co.* v. *Amalgamated Copper Co.,* 232 Fed. 574 (CA-2), in which it was held that the action was assignable, and also that it survived as against the estates of deceased persons. In that case, the court said (p. 577):

> "There can, of course, be no pretense that Section 7 of the Sherman Act provides a penalty. It awards civil damages, which are made exemplary by virtue of being treble."

In *Fazakerly* v. *E. Kahn's Sons Co.,* 75 F. 2d 110, 114 (CA-5) that Court followed the *United Copper Securities Co.* case, thereby vitiating two District Court opinions to the contrary in the Fifth Circuit. These two District Court opinions [*Caillouet* v. *American Sugar Refining Co.,* 250 Fed. 639 (E.D. La.) and *Bonvillain* v. *American Sugar Refining Co.,* 250 Fed. 641 (E.D. La.)] had been cited to Judge Sparks in *Moore* v. *Backus,* but he declined to follow them, pointing out the unsoundness of their reasoning (pp. 575-576). Again, in *Sullivan* v. *Associated Bill Posters and Distributors,* 6 F. 2d 1000, 1008 (CA-2) the Court, in holding that a cause of action under the Clayton Act survives, determined that the action was remedial and not penal.

Statute of Limitations Cases.

In eight cases, federal courts have applied to a treble damage action arising under the antitrust laws a state limitations statute governing actions upon a liability created by statute other than a penalty or forfeiture and have declined to apply the shorter state provision controlling actions upon a statute for a penalty or forfeiture.

In *Burnham Chemical Co.* v. *Borax Consolidated,* 170 F. 2d 569 (CA-9), the Court stated under the heading "Appellees' Contentions (A)" (page 575):

> "(A) On the face of the complaint this is a civil private action for damages arising under the Federal antitrust laws (Sherman Act) and is therefore an action upon a liability created by statute other than a penalty or forfeiture. . ."

And at page 578, the Court approved the contention, saying:

> ". . . the contentions of appellees as to the facts and the law are fully supported and the judgment of the lower court must be sustained."

In *Oklahoma* v. *American Book Company,* 144 F. 2d 585, 587 (CA-10) the Court held that the following Oklahoma statute (O.S. 1941, Sec. 95) was applicable to a treble damage action under the antitrust laws:

> "Second. Within three years: an action upon a contract express or implied not in writing; an action upon a liability created by statute *other than a forfeiture or penalty.*" (Italics Supplied)

In *Shelton Electric Co.* v. *Victor Talking Machine Co.,* 227 Fed. 433, 435 (D.C. N.Y.) the Court, relying on *Chattanooga Foundry and Pipe Works* v. *City of Atlanta,* refused to apply a New Jersey limitations statute governing penal actions, saying:

> "The treble damages which the complaint seeks to recover are neither a penalty or a forfetiure, but merely treble damages allowed by the law for the redress of a private injury."

The additional cases are:

Hansen Packing Co. v. *Swift & Co.*, 27 F. Supp. 364, 367 (S.D. N.Y.);

Momand v. *Universal Film Exchanges, Inc.*, 43 F. Supp. 996, 1008 (D. C. Mass.);

Dipson Theatres, Inc. v. *Buffalo Theatres, Inc.*, 8 F.R.D. 86, 89 (W.D. N.Y.);

Christensen v. *Paramount Pictures, Inc.*, 95 F. Supp. 446, 449 (D. C. Utah);

Winkler-Koch Engineering Co. v. *Universal Oil Products Co.*, 100 F. Supp. 15, 28 (S.D. N.Y.).

Cases Distinguished.

The Court of Appeals in its opinion below stated (p. 914) that "no solace is to be found in federal decisions involving causes of action such as the one asserted here." The Court then noted that there were five cases "referring to such a recovery as 'a penalty' . . ." It is respectfully submitted that in view of the analysis of the *Chattanooga* case here presented, and in view of the numerous decisions cited in this section which are square holdings on the point, that the five decisions should be reevaluated. An examination of each at the page indicated will disclose that in none was the reference to a penalty required in order to reach the decision, but rather appears to be a gratuitous characterization which the Judge happened to make in passing.

Fleitman v. *Welsbach Co.*, 240 U.S. 27, 29;

Milwaukee Towne Corp. v. *Loew's Incorporated*, 190 F. 2d 561, 570 (CA-7);

H. J. Jaeger Research Lab. v. *Radio Corp.*, 90 F. 2d 826, 828 (CA-3);

Decorative Stone Co. v. *Building Trades Council*, 23 F. 2d 426, 427-428 (CA-2);

Elizabeth Arden Sales Co. v. *Gus Blass Co.*, 150 F. 2d 988, 996 (CA-8).

IV.

In Reaching Its Decision The Court Of Appeals Made Use Of Illinois Decisions In such A Way That It Abdicated To The Courts Of Illinois Its Exclusive Responsibility To Determine The Character And Nature Of A Federally Created Right.

Any consideration of the effect of a state statute of limitations on an action created by federal law must begin with a description of the proper method of characterization of the federal action, since it is the character and nature of the action which determines the applicable statute of limitations (See Petition for Certiorari, p. 10). An excellent example of cases setting forth the proper method is *Barnes Coal Corporation* v. *Retail Coal Merchants' Ass'n.*, 128 F. 2d 645 (CA-4). This was a treble damage action under the federal antitrust laws. The Virginia Code, which contained the applicable statute of limitations, provided a five year period for actions which survived the death of a party, and a one year period for actions not of such nature. In ruling that the five year limitation period applied, the Court described the method of determining the applicable statute of limitations as follows (pp. 649-650):

> "Defendants argue that, although the cause of action be held to survive under a proper interpretation of the federal statute creating it, it would not survive under the rule of the Virginia law if created by a state statute of like import, and, therefore, is not an action which survives within the meaning of the State statute of limitations. The test prescribed by the statute of limitations, however, is survivability; and this must mean survivability under the law relating to the cause of action, since no test of survivability is prescribed by the statute of limitations. If it be said that the statute of limitations presumably has reference to causes of action created by state laws, the answer is that it is being applied here to a cause of action created by federal statute and that the essential attributes

of that cause of action can be determined only in the light of the federal law."

In its decision below, the Court of Appeals took the position that the Illinois Supreme Court has previously interpreted the meaning of the phrase "statutory penalty" as used in the Illinois two year limitations provision, that the meaning given to the phrase by the Illinois Court required the inclusion of the kind of action asserted by plaintiff in this case, and since under the doctrine of *Bauserman* v. *Blunt,* 147 U.S. 647, a federal court will adhere to a state court's construction of the state's statute of limitations, the Court was bound to apply the two year statute to the action under Section 4 of the Clayton Act. It is the view of *amici curiae first,* that the Illinois cases (discussed below) simply characterized the substantive nature of certain Illinois created actions but did not construe the meaning of the phrase "statutory penalty" as used in the two year limitations provision so that, therefore, the doctrine of *Bauserman* v. *Blunt* is irrelevant; and, *second,* the doctrine of *Bauserman* v. *Blunt* was misapplied by the Court of Appeals since the doctrine does not require or permit a federal court to look to state law in characterizing the substantive nature of a federally created right.

First. In the three Illinois cases referred to by the Court of Appeals in which a statute of limitations question arose, the Illinois court simply followed the usual method (pointed out in the *Barnes* case) for applying a limitations statute to a cause of action. It first analyzed the Illinois law under which the actions arose and then characterized the law as penal. Having made this characterization it followed automatically that the Illinois two year limitations statute relating to penalties would be applicable and, consequently, the Court in each case applied that statute.

In *C.B.& Q. RR* v. *Jones,* 149 Ill. 361, the Illinois Supreme Court (p. 375), before even considering the statute of limitations question which the case presented, and in connection with the construction of the Act to prevent un-

just discrimination and extortions in railroad rates (Ill. Rev. Stat. 1889, Chap. 114, Sections 124-133) determined that the Act was penal in nature. Having reached that conclusion, the Court applied, as a matter of course, the Illinois limitations statute governing penalties. There was no necessity for the Court to construe the meaning of the phrase "statutory penalty" as used in the two year limitations statute, and the Court did not, in fact, do so. The only Illinois statute which the Court purported to construe in that case was the substantive statute governing railroad rate discriminations under which the cause of action arose.

The same method was also followed by the Illinois court in applying the limitations statute in *Vestal Co.* v. *Robertson*, 277 Ill. 425, 428, 429, and in *Gridley* v. *Barnes*, 103 Ill. 211, 214. In the former case, the Court concluded that Section 18 of the Illinois Corporation Act was penal, and in the latter case, that Section 16 of the Insurance Law was penal. Having reached these determinations, again the Court, as a matter of course, applied the two year limitations statute.

In *Diversey* v. *Smith*, 103 Ill. 378, the last Illinois case cited by the Court of Appeals, the Illinois court did not mention, let alone discuss, the two year limitations statute which the Court of Appeals held to be applicable in its decisions below. Nothing in that case can, therefore, be regarded as interpreting the phrase "statutory penalty" in Section 15 of the Illinois Limitations Act. *Diversey* v. *Smith*, at most, sets up guide posts to be followed in determining whether the nature and character of an Illinois statute creating a substantive right is penal.

It therefore seems clear that the Court of Appeals was mistaken in its view (p. 914) that "the intent of the phrase, statutory penalty, has been determined by the Su-

preme Court of Illinois in *C.B. & Q. RR. Co.* v. *Jones*, 149 Ill. 361", and "adhered to . . . in *Vestal Company* v. *Robertson*, 277 Ill. 425 and *Gridley* v. *Barnes*, 103 Ill. 211."

Since the phrase "statutory penalty" as used in the Illinois two year limitations provision has not been interpreted by the Illinois Supreme Court, the doctrine of *Bauserman* v. *Blunt* was, accordingly, irrelevant in this case, and the Court of Appeals should not have undertaken to make use of it in reaching its decision.

Second. The doctrine of *Bauserman* v. *Blunt* was misapplied by the Court of Appeals. There is nothing in the *Bauserman* case or in the cases cited by that Court as following it (*Dibble* v. *Bellingham Bay Land Co.*, 163 U.S. 63, and *Pufahl* v. *Estate of Parks*, 299 U.S. 217) which either requires or permits a federal court, in characterizing a federally created action for the purpose of applying to it a state statute of limitations, to look to state court decisions characterizing a similar or even identical state created action.

The *Bauserman* and *Dibble* cases stand for the proposition that in a diversity case (*Bauserman*) or a state court proceeding (*Dibble*) where a local statute of limitations is applicable, its meaning is determined by state court decisions. In neither of those cases was it necessary, as it is in this case, to determine the nature of the cause of action asserted as a preliminary step in ascertaining which of several limitations provisions should be applied. Even if in those cases it had been necessary to determine the nature of the cause of action, it would have been quite proper to do so under state decisions since in both cases, unlike the situation presented here, a state created right was involved.

In the *Pufahl* case, the receiver of a defunct national bank filed a claim in a local probate court under authority of a

federal statute against a decedent's estate to recover upon the decedent's statutory liability as a stockholder of the bank. The Court held only that the local probate court procedure as provided by state law, including the time in which claims were required to be filed, was applicable to an action instituted in that court regardless of the fact that the right asserted was created by federal law. It is significant to note that in the *Pufahl* case the nature of the claim asserted was determined under federal law (p. 224) before the local claim statute was applied (p. 227).

In none of these three cases was the character and nature of a federally created right ascertained by reference to state decisions, nor was it necessary (in *Bauserman* or *Dibble*) for the court to make a choice of one of several state limitations statutes (in *Pufahl*, the choice was readily made once the nature of the action was determined). Hence, they were not really in point in this case.

The misuse of these cases by the Court of Appeals in reaching its decision is highlighted by the manner in which it felt itself required to utilize *Diversey* v. *Smith*, 103 Ill. 378, a case in which the two year statute of limitations was neither mentioned nor discussed. The court said (p. 914):

> "In view of the close analogy between the cause of action there involved and one arising under Section 4 of the Clayton Act the decision would seem to be controlling. Each is an action to recover treble damages, costs and attorneys fees, for violation of a statute. *In each, threefold damages and attorneys fees are in the nature of a penalty.* When 'the object is clearly to inflict a punishment on a party for violating' the statute, it is penal in character, and the circumstance that in punishing, remedy is likewise afforded to those having an interest in the observance of the statute is unimportant. *Diversey* v. *Smith*, 103 Ill. 378." (Italics Supplied).

The Court of Appeals thus drew an analogy between the action asserted in the *C.B. & Q. RR.* case, and the action under Section 4 of the Clayton Act because, as the Court explained (p. 914): "In each, threefold damages and attorneys fees are in the nature of a penalty." However, since the validity of the analogy depended on the existence of this similarity, it is pertinent to ask how the Court arrived at the proposition that in an antitrust action the threefold damages and attorneys fees are in the nature of a penalty. It is no answer to say that first the Court determined that an action under Section 4 of the Clayton Act was like the action in the *C.B. & Q. RR* case, and since in that case it had been determined that the action there asserted was penal in nature, therefore it followed that the action under Section 4 was penal in nature. The Court simply did not say that, and in view of what else it said, it could not have intended that. The analogy it drew was based upon the initial proposition that in both instances the action was in the nature of a penalty. To that point, no reference had been made which indicated any basis upon which the Court was entitled to characterize an action under Section 4 of the Clayton Act as penal in nature. It thereupon reached out beyond statute of limitations actions in order to create such a basis, characterizing the action as penal by reference to *Diversey* v. *Smith*, a case in which the two year statute of limitations was not involved. Had the Court recognized at that point that what it was really doing was characterizing the nature of the action and not interpreting a statute of limitations pursuant to the *Bauserman* doctrine, it should then have turned to the applicable federal decisions and reached the result that the nature of the action was not penal. Such a result, however, would not have afforded an analogy to *C.B. & Q. RR.* v. *Jones*, in which event the Court could not have decided that it had before it an analogy which compelled

the conclusion that the two year statute of limitations was applicable.

Amici curiae conclude that the use made of *Diversey* v. *Smith* by the Court of Appeals in its decision below is not within the permissible scope of the doctrine of *Bauserman* v. *Blunt* as shaped by the facts in that case and in the *Dibble* and *Pufahl* cases. In effect, what the Court of Appeals did was to abdicate to a state court its exclusive responsibility to determine the nature and character of an action created by federal statute.

V.

The Public Interest In Enforcement Of The Antitrust Laws And In Uniformity And Certainty Of Their Application Will Be Seriously Affected If The Decision Of The Court Of Appeals Is Permitted To Stand.

The Petition for a Writ of Certiorari (p. 13) sets forth the wide public importance that attaches to the question of whether suits under the federal antitrust laws are to be restricted by state statutes of limitations applicable to penal actions.

Amici curiae invite the Court's attention to the fact that finding facts and evaluating them in order to determine whether to bring an action may be particularly difficult in the antitrust field. See Hearings before Subcommittee of Senate Committee on the Judiciary on S. 1910, 81st Cong., 1st Sess. 2-10, 16-30, 33-39, 63-64, 70-78 (1949) (Test. of Thurman Arnold and George B. Burnham). In addition, the time and expense required in prosecuting a treble damage action is very often so great that if the recovery of damages is limited to two years the time and expense involved, let alone the risk of non-recovery, will foreclose numerous meritorious suits. For example, in *Emich Motors Corp.* v. *General Motors Corporation*, 340

U.S. 558, plaintiffs' expenses, exclusive of attorneys fees, amounted to more than $23,500.00, and the record discloses that the claim of attorneys for fees was based on 8,477 hours in the preparation and trial of the case. In *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 plaintiffs expended, exclusive of attorneys fees, more than $20,000.00, and the attorneys devoted more than 1,300 hours to the trial and preparation of the case. And in the recent case of *Milwaukee Towne Corp.* v. *Loew's Incorporated*, 190 F. 2d 561 (CA-7) plaintiff's expenses, exclusive of attorneys fees, were $10,914.57 and its attorneys devoted 2,388 hours to the case.

These cases are typical of the immense expenditure of time and money demanded in prosecuting a treble damage action of any magnitude. It seems apparent that limiting the recovery of damages in such cases to two years would virtually eliminate most of them, thereby likewise eliminating the chief deterrent to violators of the antitrust laws and ruining the present structure of antitrust enforcement.

Moreover, it should be noted that when Congress enacted the antitrust laws it established a policy applicable to everyone. If Congress intended these laws to be punitive, they should be everywhere punitive. If Congress intended these laws to be compensatory, they should be everywhere compensatory. To conceive of federal law as violating the policy of a state is to lose sight of the Constitution. Within the area of federal power, Congress is supreme. Its laws and the policies they express take precedence over contravening state laws and policy.

If the antitrust laws may be treated as penal in nature under the guise of giving free play to the policies of a particular state then their application becomes unreasonably discriminatory and federal policy becomes subordinate.

Hower, as the court below has itself said:

> "The [Sherman] Act is quite general in its nature, and its successful enforcement would seem to require a uniform interpretation in its application. . ." *Moore* v. *Backus*, 78 F. 2d 571, 575 (CA-7)

Any attempt at uniform application is necessarily stultified by treating private actions under the antitrust laws as anything other than remedial and compensatory, whether for purposes of determining the applicability of a particular statute of limitations or whether for any other purpose.

CONCLUSION.

In view of the analysis of the *Chattanooga* litigation presented herein; in view of the conflict created among the circuits by the decision of the Court of Appeals; in view of the extent to which that decision cuts into hitherto well established federal doctrine; in view of the confusion created by the manner in which the Court permitted federal policy to be subordinated to state policy; and in view of the paramount public importance of preserving the vitality of the antitrust laws, *amici curiae* respectfully urge that the Petition for a Writ of Certiorari be granted and that the decision of the Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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